

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Decker, 2008 NSPC 43

Date: 2008-02-29

Docket: 1783619

Registry: New Glasgow

Between:

Her Majesty the Queen

v.

Dwayne Lawrence Decker

Judge: The Honourable Judge Clyde F. Macdonald

Heard: New Glasgow, Pictou County, Nova Scotia

Decision: February 29, 2008

Charge: Section 163.1(4) of the Criminal Code

Counsel: Herman Felderhof, for the Crown
Douglas Lloy, for the Defence

By the Court:

[1] This is the matter of sentencing Dwayne Lawrence Decker, hereinafter I'll refer to him as Mr. Decker. On October 29th, 2007, Mr. Decker pleaded guilty to a charge that on or about the 7th day of June, 2007, at or near New Glasgow, Pictou County, Nova Scotia, did have in his possession child pornography, namely: numerous images of children and infants engaged in sexual activity contrary to Section 163.1(4) of the **Criminal Code**.

Section 163.1(4)(a) of the **Criminal Code of Canada** reads as follows:

Every person who possesses any child pornography is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years and to a minimum punishment of imprisonment for a term of forty-five days.

[2] Mr. Decker has no prior record under the **Criminal Code**. Mr. Decker has pleaded guilty to this charge at an early opportunity. Mr. Decker has a date of birth of December 19th, 1961. He is presently 46 years of age. His marital status is divorced. He has a grade 12 plus some community college education. He and his former wife were married in 1990 and separated in 1995. They share one child, a sixteen year old daughter who resides with her mother in Ontario. Mr. Decker resides with his mother, Dorothy Harlow, in New Glasgow. Her health is not good. She has both legs amputated above the knees and she uses a wheelchair. Mr. Decker is his mother's primary caregiver.

Mr. Decker reports a childhood that included physical abuse received from his father, sexual abuse received from his peers and molested by a member of his extended family.

[3] In the past, Mr. Decker has been employed for five and a half year in radio broadcasting throughout Nova Scotia and New Brunswick and has been employed as a labourer for a couple of years. He is currently in receipt of a disability payment from Canada Pension and receives income assistance by way of a supplement. Mr. Decker self-reports that he presently works as a peer counsellor but not for financial gain. Mr. Decker is insulin-dependent and thus a diabetic. He has heart problems, problems with asthma, nerve neuropathy, problems with his cholesterol and digestive issues. Regarding his mental health, he is currently on prescribed medication for stress, mood disorder and sleep apnea. Mr. Decker reports that he rarely consumes alcoholic beverages, does not use illegal substances and does not gamble. Therefore, Mr. Decker appears to have no problems regarding these three above-mentioned categories.

[4] The Pre-Sentence Report states that Mr. Decker appears to minimize and rationalize his actions; however, Mr. Decker has told the Court in his address to the Court that his actions were very wrong. He appears to be receptive to attending rehabilitative programs if directed to do so by the Court.

[5] On May the 31st, 2007, New Glasgow Policing Services seized the computer of Mr. Decker. Mr. Decker handed over to Cst. Hatt seven (7) CD's and approximately twenty-two (22) pages consisting of short stories regarding child pornography which contained the heading "Copyright L. Dwayne Decker".

Various dates were contained on these so-called short stories: June 21st, 2003, November 21st, 2003, May 16th, 2003, June 13th, 2003, November 21st, 2003 and June 14th, 2003 respectively.

[6] The computer was analyzed and contained images of child pornography which delved into all of the following levels or categories:

1. Images depicting erotic posing with no sexual activity.
2. Sexual activity between children or solo masturbation by a child.
3. Non-penetrative sexual activity between adults and children;
4. Penetrative sexual activity between children and adults;
5. Bestiality.

[7] Not all of the seven (7) discs contained images; however, there were at least four thousand nine hundred ten (4,910) images of child pornography present. There were some duplications. I viewed over two hundred (200) of these images of this child pornography. They were very disgusting, indescribably horrid and extremely disturbing and I'm not going to repeat them all. They were, as I've indicated,

definitely categorized and referred to in the evidence of Cst. Hatt. The enormity of these images, I find would overwhelm the mind of any reasonable person.

[8] I'm ever conversant of the Sharpe case coming out of our Supreme Court of Canada indexed as R. v. Sharpe (2001), 150 C.C.C. (3d) 321. At page 365, Chief Justice MacLaughlin stated as follows:

“ Possession of child pornography increases the risk of child abuse. It introduces risk, moreover, that cannot be entirely targeted by laws prohibiting the manufacture, publication and distribution of child pornography. Laws against publication and distribution of child pornography cannot catch the private viewing of child pornography, yet private viewing may induce attitudes and arousals that increase the risk of offence. Nor do such laws catch the use of pornography to groom and seduce children. Only by extending the law to private possession can these harms be squarely attacked.”

[9] Now here in the Decker case, there is no evidence of any immediate risk to a child as in the R. v. Fox case that I'm going to refer to. And I certainly keep in mind that Mr. Decker's child is living in Ontario with Mr. Decker's former wife. Mr. Decker, indeed, has pleaded guilty at an early opportunity. Mr. Decker has no prior record. Mr. Decker appeared to be co-operative with the police in handing over this material to the police. There appears to be no evidence that he ordered these images from a club or video source. Mr. Decker downloaded those images from the internet. Mr. Decker is the author of the so-called short stories.

[10] In the Decker case, there is no evidence of distribution of the images. The images for which Mr. Decker is charged were of course in his possession.

[11] Introduced into evidence was the exhibit which I referred to as the so-called short stories. This essay material has a heading “Copyright - L. Dwayne Decker” with certain dates. Again, there is no direct evidence of an intention to distribute. At best, Mr. Decker appears to have illusions of grandeur regarding his writing ability and the content is indeed smut personified.

[12] The Defence has referred the Court to a number of cases: **R. v. Lehman** [2007] ON CJ. 18; **R. v. Bennett** [2006] ON CJ. 3; **R. v. Leif Aoss**. The **Aoss** case, of course, was a conditional sentence of imprisonment of one year imposed by this Court on March 17th, 2004. In the **Lehman** case, Mr. Lehman received ninety days (90) in jail, three (3) year probation order and the **Bennett** case resulted in ninety (90) days in jail with a three (3) year probation order.

[13] The Crown referred the Court to the following decisions which I have read and studied:

1. **R. v. Jeffrey** [2002] OJ 3339. However, according to my search of these cases, the **Jeffrey** case was a nine (9) month jail term and that was varied on appeal to a twelve (12) month conditional sentence order.
2. **R. v. Fox** [2002] OJ 3548.

3. **R. v. Stroempl** (1995), 105 C.C.C. (3d) 187, Ontario Court of Appeal.
4. **R. v. Green** [2003] Ontario Court OJ 1314;
5. **R. v. Schan** [2002] Ontario Court of Appeal OJ 600;
6. **R. v. North** [2002] AJ 696. That's the Alberta Court of Appeal;
7. **R. v. Tyshkawich** [2001] AJ 1345;
8. **R. v. Missions** (2005), 196 C.C.C. (3d) 253, Nova Scotia Court of Appeal.

[14] I certainly keep in mind the purposes and principles of sentencing. Those are certainly well known to counsel. They're set out in Sections 718 to 718.2 of our **Criminal Code of Canada**. Punishment generally is referred to in our **Criminal Code of Canada**. The message coming from these cases regarding possession of child pornography is that a sentence imposed should denounce this unlawful conduct and that the emphasis should be placed on general deterrence and specific deterrence. The cases are quite clear that rehabilitation of the offender can't be lost because in most of these cases, a substantial period of probation has been imposed. The maximum period of probation imposed in the majority of these cases is three (3) years.

[15] I am ever mindful that there is a minimum jail period for which I have to impose upon Mr. Decker because of the law of the land.

[16] There have been good things said about Mr. Decker coming from the sworn evidence of the two (2) defence witnesses, the Pre-Sentence Report and the submission made by Mr. Lloy. Number 1: Mr. Decker is the primary caregiver of his mother. I can't imagine much worse that can happen to an older person than losing the use of both legs and having both legs, not one but two legs, amputated above the knee. It is very clear to me that Mr. Decker's mother is dependent upon him. He's the primary caregiver. They live in an apartment and I've referred to Mr. Decker's financial situation. The apartment, as I understand it, is wheelchair accessible, and it appears very clear to me if Mr. Decker receives a substantial period of incarceration, it would certainly increase the risk of his mother having to move from that apartment and find another place. Mr. Decker, I'm told, is a choir member of his church and, of course, that's disconcerting in light of the evidence of this particular charge here against Mr. Decker; however, that has been put forward by the defence as a positive aspect of Mr. Decker's life. I certainly keep in mind the sworn evidence that the social worker presented to the Court as well as the sworn evidence of Mr. Decker's mother.

[17] I certainly keep in mind the circumstances of Mr. Decker, the circumstances of the offence, the purposes and principles of sentencing, the aggravating factors and indeed the mitigating factors. I have read all the letters presented by Mr. Lloy on behalf of Mr. Decker which included his work as peer counsellor without gain. I must say the Crown's submission on sentencing was for a substantial period of jail time, twelve (12) months to fourteen (14) months. It appears that the Crown's position on that is hinged on the **R. v. Missions** case which is a 2005 Nova Scotia Court of Appeal case. A closer look at the **Missions** case would indicate that Mr. Missions was referred to as a high risk to re-offend. He had a record for sexual intercourse with a child under fourteen (14) years of age and the pre-sentence report was generally negative. He had eleven (11) prior convictions under the **Criminal Code of Canada**. I find that the **Missions** case can be readily distinguished from the circumstances in the herein Decker case.

[18] I am of the considered opinion that an appropriate period of jail time is ninety days (90) and I sentence Mr. Decker to ninety (90) days in jail. I am prepared to hear Mr. Lloy on a proposal for an intermittent sentence. In my opinion, an appropriate period of probation here is three (3) years.

[19] The conditions of the Probation Order are as follows:

1. Must keep the peace and be of good behaviour;

2. Must report to a probation officer no later than ten (10 days from today's date and thereafter as and when required;
3. Must make diligent efforts to maintain your mental health;
4. Must attend for assessment and counselling regarding your mental health as directed by your probation officer;
5. Must take, consume and ingest medication as prescribed by your medical doctor;
6. Must not use or be in possession of any personal computer or any other device capable of accessing the internet whether at your residence, at work or in a public place;
7. Must not have internet access at your place of residence where you reside;
8. Must provide consent to a police officer or a probation officer to conduct a warrantless search of your residence for the specific limited purpose of enforcing the prohibition against computers and internet access;
9. Must provide consent to the release of personal information for a police officer or a probation officer to obtain information from any

internet service provider in Canada relating to you personally or to your place of residence;

10. Must not be in the presence of any person under the age of eighteen (18) years unless that person is in the immediate presence of his or her guardian or one of his or her parents, and the exception would be incidental contact at church;
11. Must not have in your possession any pornographic material which includes pornographic material generated from a computer;
12. Must attend for any other assessment and counselling as may be directed by your probation officer.
13. Must present yourself for assessment under the sexual offender treatment program available in the Province of Nova Scotia, and if accepted for such a program, you must attend for treatment and counselling on a regular basis as directed by your probation officer which shall include a maintenance prevention program as well.

[20] I will sign a Forfeiture Order pursuant to Section 164.2 of the **Criminal Code of Canada** whereby the computer and the hard drive used in the same computer system will be forfeited to Her Majesty the Queen in the Right of the Province of Nova Scotia. The Crown has the material regarding the serial number

and the model number and so on of that computer and in the past the Crown has prepared these Orders of Forfeiture so I'll leave that with the Crown to prepare same for the Court to sign.

[21] I then have to address myself to an Order to comply with the **Sex Offender Information Registration Act** and I have to draw my attention to a Section 161 Order and a DNA Order. I note all three (3) of these Orders that I've referred to: the DNA Order, the **Sex Offender Information Registration Act** Order and the Section 161 Order are not in dispute.

[22] I certainly keep in mind that the Section 163.1 child pornography is a primary designated offence as referred to in Section 487.04 of the **Criminal Code of Canada** and I will sign an Order ordering and directing Mr. Decker to provide samples of his blood so that his DNA profile can be established and so that DNA profile can be stored in the national data DNA bank. As well, I will sign the following Order of Prohibition where Mr. Decker is prohibited for a period of ten (10) years from attending a public park or a public swimming area where a person is under the age of fourteen (14) years are present or can reasonably be expected to be present or a daycare centre, school ground or community centre (b) seeking, obtaining or continuing any employment whether or not the employment is remunerated or becoming or being a volunteer in the capacity that involves being

in a position of trust or authority towards persons under the age of fourteen (14) years, (c) using a computer system within the meaning of Section 342.1(2) for the purpose of communicating with a person under the age of fourteen (14) years.

[23] I will sign an order to comply with the Sex Offender Information Registration certificate which requires Mr. Decker to report in person at the New Glasgow Policing Services, 225 Park Street, New Glasgow, Nova Scotia, within fifteen (15) days of today's date and that he must subsequently report to that registration centre whenever required under Section 4.1 or 4.3 of the **Sex Offender Information Registration Act** for a period of ten (10) years from the date of this Order which is February 29th, 2008.

[24] This period of ninety (90) days will be served on an intermittent basis and will commence on Friday, March 7th, 2008 at 10:00 p.m. continuing on to Monday, March 10th, 2008 at noon time and each subsequent weekend thereafter until the sentence is completed. Following the first reporting weekend, which must be done at the Burnside Correctional Centre, Dartmouth, Nova Scotia, I will place a recommendation on the Warrant that the remaining weekends be served in the Antigonish Jail, Antigonish, Nova Scotia, for the following reasons:

1. Mr. Decker resides in New Glasgow, Pictou County, Nova Scotia.

2. Mr. Decker is the primary caregiver of his mother who has both legs amputated above the knee and requires to be in a wheelchair.

Clyde F. Macdonald
Judge of the Provincial Court
of Nova Scotia